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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 774

JAMES E. MARKHAM, AS ALIEN PROPERTY
CUSTODIAN, PETITIONER

v.

CONSTANTINOS G. KALLIMANIS, AND CONSTANTINOS
G. KALLIMANIS, AS EXECUTOR OF THE WILL OF
CHRIST CORCOFINGAS, DECEASED, LATE OF LOS
ANGELES, CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 151 F. 2d 145. The District Court wrote no opinion. Its findings and conclusions have not been reported.

(1)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 26, 1945 (R. 335). A petition for rehearing was denied on October 26, 1945 (R. 336). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Government seasonably appealed from a summary judgment for the defendant entered by the District Court for the Southern District of California in an action to obtain possession of and quiet title to property bequeathed to five Greek nationals which the Alien Property Custodian had vested, did the Circuit Court of Appeals properly dismiss the appeal under Rule 73 (a), Federal Rules of Civil Procedure, because of extensions of time for docketing the appeal and of assumed failure to proceed with the printing of the record?

STATUTES AND COURT RULES INVOLVED

The pertinent provisions of Section 3 of the Act of January 20, 1944, 58 Stat. 7, 28 U. S. C., Supp. IV, 9b; of Section 73 (a) of the Federal Rules of Civil Procedure; of Rule 19 of the Ninth Circuit Rules; of Sections 7 (c) and 9 (a) of the Trading with the Enemy Act; and of California Statutes, 1941, c. 895, and 1945, c. 1160, are set forth in the Appendix, *infra*, pp. 15-20.

STATEMENT

Christ Corcofingas, a resident of Los Angeles, California, died April 5, 1942 (R. 9, 56). By will (R. 208-212) which was admitted to probate by the Superior Court for the County of Los Angeles (R. 213-214), he gave \$2,000 to a resident of California and the remainder of his estate to one brother and four sisters, residents and nationals of the Kingdom of Greece. In February, 1943, respondent, Constantinos G. Kallimanis, a resident of Los Angeles, a cousin and nearest American kin of the testator and executor of the will, filed in the probate proceedings a petition for determination of heirship (R. 56-63). In that petition he invoked the provisions of California Statutes, 1941, Chapter 895 (*infra*, pp. 17-18) to disinherit the Greek beneficiaries under the will and to obtain a determination that he was the testator's sole heir at law, on the ground that Greece did not extend reciprocal inheritance rights to Americans. The Alien Property Custodian obtained continuances of this proceeding (R. 50).

Thereafter, on June 11, 1943, the then Alien Property Custodian, Leo T. Crowley, petitioner's predecessor in office, issued Vesting Order No. 1649 (R. 4) by which he vested (R. 5)

all of the estate of Christ Corcofingas, deceased, less the payment of expenses of administration, taxes, debts, and a legacy

of \$2,000.00 to Mary Lerma of Los Angeles, California.

On July 2, 1943, a hearing was held (R. 219-245) in the Superior Court on the respondent's petition to determine heirship. At that hearing, an Assistant United States Attorney filed a written appearance in behalf of the Alien Property Custodian (R. 172) and objected to further proceedings on the grounds that the net estate had, by virtue of the Custodian's vesting order, become the property of the United States and that the court was without jurisdiction to determine any interests therein (R. 226). That objection was overruled (R. 229).

On July 22, 1943, the Alien Property Custodian commenced this action in the District Court of the United States for the Southern District of California, seeking a judgment requiring delivery to himself of the net estate of the testator after administration (R. 2-6).

On July 29, 1943, a decree (R. 173-179) was entered in the Superior Court (R. 180), establishing heirship in favor of respondent Kallimannis. A motion to vacate the decree and enter a different judgment (R. 183-186), based in part on newly discovered evidence that Greece would extend reciprocal inheritance rights to Americans and in part on the asserted unconstitutionality of the California Statute, was denied on November 22, 1943 (R. 200-201). On November

24, an appeal was taken from the denial and from the decree establishing heirship (R. 202). The appeal was dismissed on July 14, 1944 (R. 83) on procedural grounds (*Estate of Corcofin-gas*, 24 Cal. 2d 517 (1944)), and a petition for a writ of review was denied on September 25, 1944 (R. 87).

A second amended complaint in the Federal court action, filed December 14, 1943 (R. 23-27) formed the basis of all subsequent proceedings in that action. The respondent, after answering (R. 27-44), filed a motion for summary judgment (R. 46-48), which was granted November 28, 1944 (R. 121-142). The judgment enjoined petitioner from further interfering with the possession or distribution of the estate.

On December 8, 1944, petitioner filed his notice of appeal (R. 144) to the Circuit Court of Appeals for the Ninth Circuit, and on that date the District Court stayed its injunction to the extent necessary to enable the appeal to be concluded (R. 145-146). On or about January 9, 1945, the time for filing and docketing the appeal in the Circuit Court of Appeals was extended for 20 days by stipulation of the parties (R. 309) made prior to the expiration of the time fixed by Rule 73 (g), Rules of Civil Procedure. Timely applications for successive extensions were granted by orders of the District Court (R. 286) and of the Circuit Court of Appeals (R. 287, 290) to May 7, 1945. On that day the transcript of record was filed and the appeal docketed in the Circuit Court of Appeals. At the same time peti-

tioner filed his designation of the record for printing (R. 298-301) and his designation of Parker and Company of Los Angeles to print the record (R. 297). On May 11 the respondent filed a counter designation of parts of the record for printing (R. 302).

The United States Attorney's office, on June 14, 1945, obtained from the designated printer an estimate of the cost of printing the record (R. 322) and on June 16 wrote to the Attorney General requesting authorization to expend the estimated amount (R. 326). The Attorney General authorized the expenditure by letter dated July 7, which was received by the United States Attorney on or about July 13 and transmitted to the Clerk of the Circuit Court of Appeals, who received it on July 16 (R. 338-339). Thereupon, on the same day, the clerk sent the transcript of record to the designated printer with instructions to print (R. 339).

On July 16 the respondent served on the petitioner a motion to dismiss the appeal for lack of prosecution (R. 323-325) and three supporting affidavits (R. 308, 311, 321). The motion was filed on July 18 (R. 325), on which date the clerk recalled the transcript from the printer (R. 340) to have it available for the Circuit Court in the hearing on the motion to dismiss, which was set for July 30, 1945. An affidavit in opposition to the motion (R. 325-328) was filed July 26, and

the motion was argued and submitted on the date set (R. 328). The Circuit Court's opinion and judgment dismissing the appeal under Rule 73 (a) of the Rules of Civil Procedure for failure to take necessary steps to perfect the appeal were filed September 26, 1945 (R. 329-335).

The petitioner filed a petition for rehearing (R. 341-345) on October 25, 1945, and it was denied the following day (R. 336).

REASONS FOR GRANTING THE WRIT

Throughout the proceedings in the state and Federal Courts, the Alien Property Custodian has sought to represent the interest of the United States and to fulfill the Government's responsibility to foreign nationals with respect to the property in question.¹ The importance of the interests involved, which the dismissal of the appeal by the court below defeats without reference to the merits, results in the presentation to this Court of this petition and of the following reasons in its support.

1. *The Court below so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.*

¹ The international aspects of the problem involved are reflected in a petition and motion of the Greek consul in the Superior Court, seeking to have that court's decree set aside (R. 91-101).

In its opinion (R. 329-335) the court below summarized the state court proceedings which we have detailed above and the steps in the Federal court action. It then quoted a portion of its Rule 19 (*infra*, p. 15), requiring payment to the clerk of the cost of printing the record within 10 days after receipt of the clerk's estimate; noted the request to the Attorney General on June 16, 1945, for authorization to print the record; and pointed out that on July 13 the designated printer had not received any order to print the record. Characterizing the delay in printing and the previous extensions of time for docketing the record as "extraordinary" and unwarranted by the reasons advanced, the court dismissed the appeal by virtue of its discretionary authority. (R. 333-334.) The court apparently overlooked the fact that the authorization to print had been received by the clerk and that he had sent the transcript to the printer on July 16, two days before the motion to dismiss was filed.

The court also overlooked the inapplicability of Rule 19. The petitioner availed himself of the privilege afforded by the Act of January 20, 1944 (*infra*, p. 15) of designating the printer. The court below had made no change in its rules to cover printing done pursuant to such action; but the clerk, apparently recognizing the inapplicability of the Rule, did not notify petitioner of any estimate of cost of printing the record or of

any fee for preparing the record. We submit that in invoking the Rule the court manifestly erred and proceeded contrary to the statute.

The opinion below holds that the pendency of a petition for certiorari in the related case of *Markham v. Allen*² did not justify petitioner's delay in ordering the printing of the record. The court makes the erroneous assertion that in the *Allen* case the petitioner was contesting the state court's jurisdiction, whereas actually he was seeking merely to establish the Federal court's jurisdiction to determine his right to take the interest of certain alien legatees, without interference with administration in the state court. Both cases, however, involved the jurisdiction of a Federal court to determine a claim by the Alien Property Custodian to property bequeathed non-resident aliens, which the Custodian had vested, notwithstanding the pendency of administration proceedings in a state court. The pendency of the certiorari proceedings in the *Allen* case was urged as a ground for the last extension of time for docketing the appeal (R. 288-289), which was granted by the then Senior Circuit Judge (R. 290) for the reasons advanced. Moreover, delay caused by the Assistant United States Attorney's intention to recommend abandonment of the appeal if certiorari should be denied in the *Allen* case (R. 326-327), which amounted to 35

² Certiorari granted May 28, 1945, No. 1167, October Term, 1944. Reversed, January 7, 1946, No. 60, October Term, 1945.

days between the service of respondent's counter designation of record for printing (R. 302) and receipt of the printer's estimate of cost (R. 322), hardly merits imposition of the penalty of dismissal, even if the delay was unjustified.

The further 32 days elapsing before the clerk received the authorization to print is not unusual in government appeals in the Ninth Circuit, because of loss of time in the mails superimposed upon the time consumed by administrative safeguards surrounding the expenditure of public funds. The imposition upon the Government of a time schedule measured by the requirements of the Ninth Circuit's Rule 19 would create a serious situation. Congress has recognized that the Government is not geared to operate as rapidly as private litigants, as have this Court and its Advisory Committee on Rules of Civil Procedure. See 28 U. S. C., Supp. IV, 902; Rule 12 (a) of the Rules of Civil Procedure; and the proposed amendment to Rule 73 (a) together with the comments thereon at p. 84 of the *Second Preliminary Draft* of the Proposed Amendments. Instances of a circuit court's imposing the most drastic penalty at its command because of delay in one of the steps in perfecting an appeal which had been taken seasonably³ are not abundant.

³ That the petitioner was not seeking delay is shown by the fact that although the period for appeal is three months, 28 U. S. C. 230, this appeal was taken ten days after the entry of judgment.

On the contrary, the accepted and usual course has been, in keeping with the obvious intent of the framers of Rule 73 (a),⁴ to dismiss seasonably-taken appeals only for extreme and inexcusable delay in their perfection.

2. Petitioner's Appeal has Merit and its Preservation is Essential to the Protection of Important Interests for which Petitioner is Responsible.

The conclusions of law of the District Court (R. 136-139), leading to its summary judgment in favor of respondent, include holdings that the Superior Court had jurisdiction of a claim to property vested by the Alien Property Custodian in himself and that the decision of the Superior Court rendered the issues between petitioner and respondent *res judicata*. The District Court found (R. 129-130) that prior to the filing in the Superior Court of the Alien Property Custodian's vesting order, the appearances by government counsel to obtain continuances in that court were made on behalf of the Greek beneficiaries of Christ Corcofingas' will. It would certainly be contended in the future, therefore, that the District Court's judgment not only bars the petitioner from further steps to assert his claim

⁴ Compare Rule 73 (a)'s provision for "such action as the appellate court deems appropriate, which may include dismissal of the appeal," with the Ninth Circuit's Rule 19 "whereupon the cause will be dismissed unless good cause to the contrary is shown" (R. 333). See also *Knight v. People*, 151 F.2d 534 (C. C. A. 9).

to the property in question, but also forestalls resort to legal remedies by the Greek beneficiaries themselves, should they ever be in a position to bring proceedings in an American court.

We submit there is strong ground for the petitioner's contention that the District Court was in error in its decision and that the preservation of this appeal is important to interests which should receive every consideration. The vesting of the property in petitioner remitted respondent to his remedy under Section 9 (a) of the Trading with the Enemy Act (*infra*, p. 16), see also Sec. 7 (c) (*infra*, p. 16); *Commonwealth v. Von Zedtwitz*, 215 Ky. 413 (1926), or to his defense of the present action, if he wished to assert his claim under the California statute. Upon the Custodian's vesting of the property (R. 56-63), the proceeding in the Superior Court became in effect a suit against property of the United States. That court had no jurisdiction of such a suit, and no officer of the United States was empowered to confer jurisdiction by appearing; nor does the court's judgment render *res judicata* the issues as against the United States. *United States v. U. S. Fidelity Company*, 309 U. S. 506; see *Kalb v. Feuerstein*, 308 U. S. 433.

Should petitioner ultimately prevail in this action,^{*} it is probable that the property will be

^{*} Not only is credible evidence of reciprocal inheritance rights in Greece available (R. 191, 195, 198), but by virtue

restored to the Greek nationals to whom the testator bequeathed it. Legislation to authorize "the President * * * to restore property vested in or transferred to the Alien Property Custodian during World War II to persons who were never hostile to the United States" (H. Rep. 1269, 79th Cong., 1st Sess.) has been passed by the House of Representatives. It is supported by the Secretary of State, the Attorney General, the Alien Property Custodian, the Treasury Department, and the Bureau of the Budget, and its enactment is likely. The Greek beneficiaries of Christ Corcofingas' will may come within its terms. The filing of this petition constitutes a final effort to safeguard their interests pursuant to the international obligations of the United States. Should the effort fail, the Greek beneficiaries would be remitted to a diplomatic claim by their Government against the United States for reparation for this Government's failure. See Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 310, 315. Such an outcome is manifestly to be avoided if possible.

of recent legislation such reciprocal rights are presumed to exist and the burden of proving their nonexistence would now be on the respondent (Calif. Stat. 1945, c. 1160, *infra*, pp. 19-20). However, if respondent should prove the nonexistence of reciprocal rights, the petitioner would contend that California Statutes, 1941, c. 895, is unconstitutional.

CONCLUSION

For the foregoing reasons the granting of this petition is respectfully requested.

J. HOWARD McGRATH,
Solicitor General.

JANUARY 1946

